**Qwest**
1801 California Street, Suite 5100
Denver, Colorado 80202
Phone 303 672-2859
Facsimile 303 295-7049
KKRAUSE@QWEST.COM

**Kathryn Marie Krause**
Senior Attorney

***EX PARTE***

May 14, 2002

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: CC Docket No. 96-115, Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information

CC Docket No. 96-149, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended

Dear Ms. Dortch:

With this letter, Qwest addresses briefly some *ex parte* filings made to the Federal Communications Commission ("FCC" or "Commission") by various parties since the close of the formal comment round in this proceeding in November, 2001. Specifically, below Qwest addresses arguments made in *ex parte* filings on the matter of Customer Proprietary Network Information ("CPNI") by the National Association of Regulatory Utility Commissioners ("NARUC"), Nov. 16, 2001; State Attorneys General ("State AGs"), Dec. 21, 2001; Arizona Attorney General ("Arizona AG"), Jan. 25, 2002 (attaching transcript of hearing before the Arizona Corporation Commission ("ACC")) and Feb. 1, 2002 (attaching newspaper article); ACC, Jan. 28, 2002 (addressing contents of Qwest's opt-out notice and associated processes); Public Service Commission, State of Montana, Feb. 21, 2002; and the National Association of State Utility Consumer Advocates ("NASUCA"), Apr. 12, 2002 (urging the Commission to adopt an opt-in but dedicating most text to a discussion of opt-out notices).

Qwest also encloses copies of recent filings with state regulatory Commissions in Arizona and Washington on the subject of CPNI regulation.[1] The filings include discussions on a variety of issues pertaining to CPNI use and approval process.

[1] There are two filings associated with the Washington Utilities and Transportation Commission ("WUTC"), dated Mar. 21, 2002 and Apr. 12, 2002 (Appendices A and B). There are also two filings associated with the ACC, dated Mar. 29, 2002 and Apr. 29, 2002 (Appendices C and D). The submissions to this Commission are without attachments to the state filings.

*Ex Parte Filings*

Since the close of the formal comment round in this proceeding, the Commission has received filings from a variety of state regulatory and law enforcement entities, as well as from a national consumer advocate's organization. These filings outline states' interests in CPNI in the context of both internal corporate use and disclosure to third parties.

Qwest, like the states and consumer representatives, is aware of, and sensitive to, matters of "information privacy," whether the context is financial, health, retail or telecommunications. Qwest in fact appreciates customer privacy concerns and has a long, continued history of protecting not only the content of customers' conversations but the transactional information associated with customers' purchases and use of services. In keeping with its long-standing practices of protecting the confidentiality of customer information, Qwest does not provide CPNI to unaffiliated third parties for their own independent marketing use and includes appropriate protections when CPNI is shared with third-party agents and contractors.[2]

Without exception, all of the *ex partes* referenced above call upon the Commission to promulgate a CPNI opt-in approval regime.[3] Qwest, of course, believes such action is precluded as a matter of constitutional law by the Tenth Circuit's opinion.[4] It also believes that such action

---

[2] *See* Qwest Letter to Paul A. Bullis, State of Arizona, Office of the Attorney General, dated Feb. 7, 2002, enclosed as Appendix E.

[3] The NARUC *ex parte* states (Qwest believes incorrectly given the tenor of the remainder of its comments) that "an opt-in approach is an ineffective method to protect sensitive private information." The same phrasing is used in its attached Resolution. Qwest assumes NARUC meant to refer to an "opt-out approach."

A number of the *ex partes* also address the opt-out notice sent out by Qwest to its customers in December, 2001. *See, e.g.,* Arizona AG's Jan. 25, 2002; ACC's Jan. 28, 2002; NASUCA's Apr. 12, 2002. Qwest realizes that its notice, as represented by the significant press coverage surrounding it, left some customers confused about Qwest's intentions. That was quite unfortunate, especially in light of Qwest's historical treatment of customer information and Qwest's protection of its confidentiality. Qwest did not intend to create the impression that unfettered sharing of CPNI would occur in the future outside of relationships where the sale of Qwest services were involved. But use of CPNI pursuant to the Qwest opt-out notice is moot. As the Commission is aware, Qwest has announced that it will not proceed to share CPNI among affiliated companies pursuant to that notice.

This *ex parte* is not intended to address the content of the Qwest opt-out notice, given that no action is expected pursuant to it. However, Qwest emphatically denies the NASUCA claim that the notice "fail[ed] to meet even minimal standards for informed consent" (NASUCA Apr. 12, 2002 *ex parte* at 1-2). *See, e.g.*, *Scofield v. Telecable of Overland Park, Inc.,* 973 F.2d 874 (10th Cir. 1992). And, below Qwest responds to incorrect assertions about the notice not being in Spanish.

[4] *U S WEST v. FCC,* 182 F.3d 1224 (10th Cir. 1999) ("*U S WEST*"), *cert. denied*, 120 S.Ct. 2215 (June 5, 2000).

would be contrary to the public interest. The better public policy is to provide those persons who feel strongly about CPNI being used to market services to them outside their current service category an opportunity to request that a carrier not use CPNI in that way, *i.e.*, an opt-out.

The First Amendment, as construed by the Tenth Circuit, makes clear that in fashioning future CPNI rules, the Commission should remain grounded in the *facts* about CPNI and its use and should not base its decision on the kinds of generalized concerns voiced in the *ex partes*.[5] Carriers' CPNI use involves truthful information lawfully collected and generated by a telecommunications service provider in its course of providing service. The record is void of evidence *demonstrating* carrier misuse of CPNI. Allegations of "harm" are almost always hypothetical and speculative.[6] The absence of proven consumer harm is contrasted with evidence in the record that carriers treat this information confidentially and that consumers can alleviate undesired marketing contacts at the point of the contact by asking to be put on "Do Not Call" lists.[7] Restricting the flow and use of CPNI is unnecessary to protect consumers whose ultimate objective is to avoid unwanted marketing contacts.

Moreover, as the Commission works to craft new CPNI rules appropriate to the Tenth Circuit's vacation of those rules,[8] it must be remembered that (a) the Court referenced "important civil liberties" that were "abridge[d]" or "restrict[ed]" by the mandatory opt-in process;[9] (b) expressed serious "doubts" whether the government interests proffered by the FCC were "substantial;"[10] and (c) concluded that in all events the regulations were not "narrowly tailored" to minimize the burden on protected speech.[11] In acting as it did, it is clear that the Tenth Circuit appreciated the difference between a vacatur and a remand.[12] Because of the serious constitutional issues involved and the doubt associated with the ability of the Commission to

---

[5] Concern over privacy and information uses is clearly not confined to telecommunications carriers. Generally, individuals continue to shift status with respect to privacy matters, shifting from "unconcerned" to privacy "fundamentalists" and "pragmatists." *See* Appendix D, submission to the ACC at 10-11 n.20.

[6] The State AGs postulate (at 5-6) that a variety of uses of CPNI can be envisioned which they deem contrary to the consumer welfare. They assert that their concerns are more than speculative because they claim evidence that certain financial institutions misused personally-identifiable information in the late 90s. This, of course, is not evidence that carriers historically or currently have misused CPNI. Nor is it evidence that carriers will misuse CPNI in the future.

[7] States increasingly are adopting more extensive "Do Not Call" lists managed by state administrators. Moreover, some states, such as Arizona have "directory markings" that restrain unfettered telemarketing contacts. *See* ACC submission, Mar. 29, 2002 at 8.

[8] *U S WEST*, 182 F.3d at 1240.

[9] *Id.* at 1228, 1232.

[10] *Id.* at 1235, 1236-37.

[11] *Id.* at 1238-39.

[12] *See* Qwest Comments, filed Nov. 1, 2001 in the above captioned proceedings at 6-7 and n.24.

craft a lawful opt-in CPNI approval regime, the vacatur was appropriate. As the Court of Appeals for the District of Columbia has stated,

> Under the APA [Administrative Procedure Act] reviewing courts generally limit themselves to remanding for further consideration an agency order wanting an explanation adequate to sustain it. . . . In the present case, however, the agency appears to have been more errant than recalcitrant. . . . 'The decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.' . . . .Because the probability that the Commission would be able to justify retaining [its rule] is low and the disruption that vacatur will create is relatively insubstantial, we shall vacate the . . . Rule.[13]

In light of the Tenth Circuit's vacatur, relying as it did on the constitutional principles of *Central Hudson Gas and Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980) ("*Central Hudson*"), the Commission has a heavy burden should it be inclined to proceed with a lawful CPNI opt-out approval mechanism.

As the Commission continues with its deliberations, Qwest wishes to stress the following points that it made in filings with the Arizona and Washington state regulatory authorities.

- An opt-in CPNI approval regime cannot withstand constitutional scrutiny under *Central Hudson*. This is true both with respect to corporate speech among affiliates and speech by the corporation to customers and prospective customers. Customer privacy interests in CPNI are quite adequately protected through an opt-out approval process. This is true both with respect to internal uses of CPNI and to external uses that are predictable and contain their own "privacy protections."[14] Given constitutionally-protected speech, the Commission must balance consumer privacy interests (and the derivative standing of those asserting such rights on consumers' behalf) with the further inquiry of whether a CPNI opt-in approval regime advances consumers' and government interests in a direct and material way in a manner that is narrowly-tailored. Qwest believes an opt-in CPNI approval regime cannot be sustained under such standard.
- As a legal and policy matter, CPNI should not be parsed by "type" into CPNI that is service/feature related and CPNI that is usage related (*e.g.*, full call detail).[15] Barring any evidence that carriers use CPNI usage information in a manner that presents real or substantial harm to consumers, the use of call information by carriers should not be

[13] *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1047-48, 1053 (D.C. Cir. 2002).

[14] These external uses would include situations where carriers act through agents or contractors to provide business office functions (sales and customer care), as well as joint marketing relationships, where CPNI is "protected" by restrictions on use and requirements that the information be safeguarded.

[15] Call detail CPNI is addressed at length in Qwest's letter to the WUTC (*see* Exhibit B) and its submission to the ACC at 11-15 (*see* Exhibit D).

constrained by the government.[16] This is all the more obvious when one considers that the Tenth Circuit was aware of call detail CPNI when it handed down its opinion striking down the Commission's opt-in rules.[17] Less restrictive means are available to protect consumers' privacy interests, such as regulations restricting the matching of call detail with identifications.

- A review of legal precedent beyond that involving constitutional principles indicates that internal use of CPNI by a carrier, or limited external release, would fail to constitute an invasion of privacy even under well-recognized tort law associated with invasions of privacy. This is compelling evidence that most lawmakers and courts have drawn the line regarding information use and privacy invasions at a standard involving information where the release would be **highly** offensive to a reasonable person.[18]
- It cannot be disputed that highly-restrictive information sharing and release processes impose significant costs on businesses and their customers. Because of the high barrier to communication imposed by opt-in regimes, the government cannot impose such a regime under any rational cost-benefit analysis, at least not with respect to internal communications.[19]

---

[16] Absent any government compulsion, Qwest has announced that it will not use "full" call detail (*e.g.*, seven or ten-digit dialing information) in its marketing activities. Other carriers, however, have not made similar commitments. And, Qwest does retain the right to use NPA-NXX information as appropriate.

[17] *U S WEST*, 182 F.3d at 1229 n.1, 1235, 1237. The State AGs reference (at 4 n.6) *Smith v. Maryland*, 442 U.S. 735 (1979) (Stewart, J., dissenting) in support of their position that call detail information requires extraordinary CPNI protection. Among the weaknesses of this citation is that it is from the dissenting opinion. But the primary problem with the citation is relevance. As the Tenth Circuit stated, this current situation does not involve the "private" nature of CPNI *vis-à-vis* the government but activity between two private parties, one of which is in lawful possession of the information. *Compare U S WEST*, 182 F.3d at 1234 n.6 ("the question is solely whether privacy can constitute a substantial state interest under *Central Hudson*, not whether the FCC regulations impinge upon an individual's right to privacy under the Constitution.").

[18] This concept is captured in the materials submitted to both the WUTC and the ACC. *See* Appendix A at 11; Appendix C at 9.

[19] *See U S WEST*, 182 F.3d at 1238 (noting that a cost/benefit analysis is appropriate in assessing government restraints on speech rights). *And see* Appendix C at 3 (referencing testimony before the Federal Trade Commission to the effect that individuals respond to "approval" processes by accepting the "default" process 85% to 95% of the time; if the default is opt-in, 85% of individuals will "choose" not to have information used; if the default is opt-out, 95% will allow information to be used. The authors of the testimony conclude that an opt-in regime dramatically reduced the amount of information available and imposes substantial costs on consumers).

Qwest herein encloses a document entitled "The Hidden Costs of Privacy: The Potential Economic Impact of 'Opt-In' Data Privacy Laws in California," by Peter A. Johnson and Robin

- The Commission should not retreat from its prior, correct, determination that a state's attempt to impose a general CPNI opt-in approval regime (either by legislation or regulation) would be preempted.[20] Under the same rationale, an attempt to restrict the use of call detail beyond that permitted by the federal rules (*e.g.*, requiring opt-in for the use of such information) would likewise be impermissible.

Finally, Qwest takes this opportunity to respond to one of the ACC filings (Jan. 28, 2002). The ACC makes the statement that Qwest sent out an opt-out notice in Arizona that was not translated into Spanish and had no Spanish speaking operators available to take calls from persons speaking Spanish who wanted to opt-out. That undoubtedly was the understanding of the ACC at the time it communicated with the Commission. (At the Arizona hearing on CPNI there was no one present who could speak to the matter directly.) However, Qwest has since advised the ACC Staff that Qwest had sent out opt-out notices in Spanish to those customers who had previously identified themselves to Qwest as desiring (and receiving) Spanish-language bills. The notice included in the billing envelope was in Spanish and gave a telephone number to call that was directed to Spanish-speaking attendants.

Should you wish to discuss any of the attached material or the contents of this correspondence, feel free to contact me at any of the above contact numbers.

cc: Marcy Greene (via email: mgreene@fcc.gov)

---

Varghese, January 2002, that was provided to both the Washington and Arizona regulatory authorities. *See* Appendix F. While the document pertains to a particular jurisdiction (California) and focuses on specific data collection and sharing practices other than carriers and CPNI, its conclusions regarding the increased costs that carriers would experience (particularly search and compliance costs) were an opt-in CPNI approval regime to be adopted are instructive. Such costs, of course, would ultimately burden carriers' customers.

*See* also Fred H. Cate, Principles of Internet Privacy, 32 Conn. L. Rev. 877, 883 (2000) ("information on the characteristics of consumers . . . has enabled producers and marketers to fine tune production schedules to the ever greater demands of our consuming public for diversity and individuality of products and services [and is] essential to the functioning of an advanced information based economy such as ours," quoting from Federal Reserve Board Chairman Alan Greenspan).

[20] *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Second Report and Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd. 8061, 8077-78 ¶¶ 18, 20 (1998) (state regulations that would be preempted include "those permitting greater carrier use of CPNI" and those that "sought to impose more restrictive regulations" because either situation would involve a conflict with Congress' balance of privacy interests with the promotion of competition that is promoted through this use of CPNI).